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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935.

No. 169

UNITED STATES TRUST COMPANY OF NEW YORK,
TRUSTEE UNDER DEED OF TRUST OF JOHN P. WILSON,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY OF PETITIONER TO BRIEF FOR THE RESPONDENT.

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GENERAL OUTLINE OF PROCEEDINGS.

The petition for certiorari with brief in support thereof was filed on June 25, 1935. Certiorari was granted October 14, 1935. Petitioner elected to stand on its brief filed in support of the petition. Respondent filed a brief in opposition to the petition and has recently filed an additional brief on the merits.

This reply is made by petitioner so that its position with respect to certain of the facts stated and arguments made in respondent's last brief may be clarified. No effort will be made to restate the facts, authorities and arguments

contained in the petition for writ of certiorari and in the brief in support thereof, which the petitioner requests the Court to consider with this reply as fully stating the position of petitioner.

In 1913 John P. Wilson created a trust of which the petitioner herein was trustee. Pursuant to the power reserved in the trust agreement, it was four times amended by written instruments. The validity of the amendments as such is not questioned. By stipulation all issues were waived except one. (R. 75.) The sole question before this Court is whether the original instrument as amended created one or three trusts. If there is one trust, an additional tax is due, if three, no additional tax is due. The question is important not only because of the income tax features involved, but also because of its bearing on the administration of trusts generally.

The Board of Tax Appeals determined that there were three trusts. The Circuit Court of Appeals for the Second Circuit disagreed with the Board and held that there was but one trust. In the companion case of *Commissioner* v. *McIlvaine,* 78 F. (2d) 787, precisely the same question is involved in a case which is admitted to be substantially identical with the present case. There the Board of Tax Appeals again held that three trusts were created, and the Circuit Court of Appeals for the Seventh Circuit agreed with the Board, notwithstanding that the Court had before it the decision of the Circuit Court of Appeals for the Second Circuit in the instant case. There is thus a direct conflict between the two Circuits. Both cases are now before this Court.

Facts.

Since the first, second and third amendments were all in effect a number of years prior to 1924 and throughout all the years here involved, and since those amendments by their terms merely changed the original instrument, which remained in full force and effect except as changed, the document to be interpreted by this Court is the original instrument as changed by all the amendments and not the original instrument merely as changed by the first amendment. Therefore the language of the second and third amendments is at least as important as the language used in the first amendment, and all must be considered together as forming one instrument. The fourth amendment was adopted in 1928, and therefore was in effect for only a part of the period now being considered. The language used in that amendment, which was solely for the purpose of enlarging the power of the Trustee to borrow money, by its specific reference to the three trust estates, includes additional and cumulative evidence of the exact intention of the parties.

Respondent quotes from the first amendment but not from the later amendments. It is impossible by mere paraphrasing to adequately convey the real purpose and intent of the parties as disclosed by the modified trust agreement. The first three amendments appear on pages 49 to 55 of the record, and the last amendment appears on pages 82-83. They should be read in full if the real intention of the parties, as shown by the documents themselves, is to be completely understood. Brief quotations indicating their general scope are made (pp. 9-10) in the brief of petitioner filed in support of the petition for certiorari.

Respondent at several places in his brief (pp. 6-7) repeats the same error found in the statement of the court below, to the effect that after the amendments undivided

one-third interests in the original fund were assigned by the Trustee to each *beneficiary*. There can be no question, if this record is read as a whole, that there was never any assignment of any kind whatsoever to the beneficiaries as such. The assignments were in every case to the *separate trusts* set up for the several beneficiaries. The Assistant Comptroller of the United States Trust Company of New York, the Trustee in this case, testified (R. 89) that after the first amendment

> "* * * Three accounts were opened, one in the name of 'Trust under the Deed of John P. Wilson for John P. Wilson, Jr.'; one under the name or heading 'Trust under Deed of John P. Wilson for Anna W. Dickinson'; and one under the name of 'Trust under Deed of John P. Wilson for Martha Wilson'. The income, after this time, was credited to the individual accounts and all transactions affecting the trusts were put through the individual accounts. I mean by individual accounts, separate accounts. The property was divided on our property records, and the income and interest were credited separately. * * *"

There can be no question but that the Trustee credited the property and the income not to the individual beneficiaries but to the separate trusts set up for the individual beneficiaries. That situation is necessarily implicit in the present tax case, which is based on the contention of the Commissioner that additional taxes are due on income *accumulated by the Trustee*. The case would not be here if the income had been paid or credited to the individual beneficiaries. The only question is whether the accumulations are by three separate trusts or by a single trust.

On page 7 of respondent's brief is the statement that aside from the establishment of three separate accounts on the books, the petitioner treated the estate or property as held in one trust. This statement is not justified by the record. On the contrary, the record shows that the Trustee, after the amendments were in effect;

(1) Closed out on its books the old account kept for the single trust (R. 89, 90, 100):

(2) Opened up three new accounts, one for each of the separate trusts, and assigned an undivided one-third interest in the corpus of the old trust estate to each of the new trust accounts (R. 89, 90, 100);

(3) Caused the vault records to show that a one-third interest in the securities held in its vaults was owned by each of the three separate trusts (R. 99-100);

(4) Divided all income as received among the separate trusts (R. 89-90);

(5) Charged the disbursements as made to the separate trusts (R. 101);

(6) Made regular reports to the respective beneficiaries as Trustee of three separate trusts (R. 94-95);

(7) Filed information returns (Form 1041) to the Federal Government as Trustee of three separate trusts and filed income tax returns (Form 1040) as Trustee of three separate trusts (Exhibits 4 to 39, R. 103-143);

(8) Figured its commissions separately on each trust (R. 101);

(9) And in at least one year prior to 1934 credited separately to the several trusts refunds paid by the Federal Government on account of income taxes, the payment to one of the trusts having been received long after the payments to the others had been made. (R. 101.)

Respondent further states, on page 7 of his brief, that the petitioner, the United States Trust Company of New York, kept only one bank account into which all receipts of cash went and from which all disbursements of cash were made. So long as the books of the Trustee showed clearly the interest of each of the three separate trusts in that account, that fact, as stated, could have no bearing on

the decision in this case. Respondent, however, fails to tell the whole story as found in the record. The testimony in the case was not that the cash held for these three trusts was kept segregated in a single account, but that all of the cash held by the United States Trust Company of New York, in the thousands of trusts of which it is Trustee (including, of course, the three Wilson trusts) was all deposited in one account, and that in this respect the three Wilson trusts were treated exactly as all the other trusts administered by the United States Trust Company of New York. (R. 98, 102.)

Respondent also says (page 7) that the amendments to the deed of trust were made for the purpose of identifying the interests of the respective beneficiaries and to reduce taxes on undistributed income by having the same taxed as income of three separate trusts rather than as income of one trust. The testimony on page 83 of the record, to which counsel refers, was given in answer to questions propounded by counsel for respondent on cross-examination. The record reads as follows:

> "The purpose of the amendment of September 21, 1918, was to have the trust estate divided into three separate trust estates and constitute three separate trusts, one for each of the three children of John P. Wilson, the original creator of the trust; also the question of minimizing taxes entered into the matter. * * *"

ARGUMENT.

Decision of Court Below.

The validity of the amendments is not in question. They were adopted in the form required by the provisions of the original trust indenture permitting the alteration, change or modification of that instrument to any extent and in any respect whatsoever.

The decision of the Circuit Court of Appeals for the Second Circuit below is based on the fact that the Trustee did not *physically* divide the aggregate fund, and assign specific shares of stock, specific bonds, and specific dollars to each of the three trusts. The only reason advanced by the court for its decision that only one trust was created, is that the purpose of the parties to create separate and independent trusts was ineffective because an undivided interest in a definite aggregate fund is too indefinite to form the corpus of a separate trust. A brief quotation from the decision of the court will make this position perfectly clear (R. 192, 193):

> "• • • Acquired property after the first amendment, as well as before, was maintained in the aggregate, and only undivided interests were assigned to the respective accounts set up for the beneficiary.[1] The income derived from all the trust property and each and every item thereof was assigned to the respective accounts, one-third to each account. While this was an allocation to the respective accounts in equal shares, it was held by the trustee in one fund deposited in a single account. • • •
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> • • • • • •
>
> "Under applicable rules of law the claim of three trusts must fail. The amendments resulted only in setting up separate accounts for the beneficiaries [sic],

(1) This is again a misuse of the word beneficiary, the accounts were really set up in the name of the separate trusts.

which recorded their undivided one-third interests. The property itself continued to be held in the aggregate as a single trust fund, *and consequently* there was but one trust estate, rather than three, during the taxable years in question. * * *[2]

* * * * * *

"* * * In the instant case, the deed provided that it should be construed according to the laws of the state of Illinois and, in view of what was said in *Snyder* v. *Snyder, supra,* the amendments were ineffective to create separate and independent trusts for each of the beneficiaries *for lack of a definite and separate corpus.*" (Italics ours.)

RESPONDENT'S FORMER POSITION.

Until respondent's last brief was filed, respondent had taken this same position, contending that the reason three trusts had not been created was because an undivided interest is not sufficiently definite to constitute the corpus of a separate trust estate. In these very proceedings, in his brief in opposition to the petition for certiorari, respondent, while denying that he contends an undivided interest in property may not be the subject of a trust, nevertheless says (p. 11):

"All that the amendments accomplished was to set up separate accounts for the beneficiaries, [sic] recording their undivided interests in property held under the original trust deed and additions thereto. Such property was held in aggregate as a single trust and there was not at any time a division thereof. *The amendments cannot be effective as erecting separate and distinct trusts for lack of definite subjects.*" (Italics ours.)

In respondent's brief in opposition to the petition for certiorari (p. 10) he again cited the two Illinois cases, *Marble* v. *Marble's Estate,* 304 Ill. 229, 235, and, *Snyder* v. *Snyder,* 280 Ill. 467, 469, both of which, and particu-

(2) Citing, among other cases, *Marble* v. *Marble's Estate,* 304 Ill. 229, 235, 136 N. E. 589. *Snyder* v. *Snyder,* 280 Ill. 467, 469, 117 N. E. 465.

larly the *Snyder* case, had been relied upon in the decision by the Circuit Court of Appeals. These cases merely lay down the general rule that three conditions must concur in the creation of a trust—there must be sufficient words to raise it, there must be a definite object, and there must be a definite subject. The only one of these three conditions which respondent or the Circuit Court of Appeals suggested was not met in the instant case was the condition requiring a definite subject, that is, a definite corpus. This opinion of the lower court (and this position of respondent) was based solely on the proposition that undivided interests in an aggregate fund (which was the situation here) are too indefinite to form the corpus of a separate trust.

The authorities do not sustain any such principle and we believe that the Court is entitled to take judicial notice of the fact, if this record does not establish it, that such a contention is in conflict with the administrative practices of trustees generally. There can be no question but that an undivided interest in a larger fund is sufficiently definite to properly and legally constitute the corpus of a separate trust. We call attention again to the authorities cited in petitioner's brief in support of the petition for certiorari, pages 20 to 22. Since the printing of that brief the final draft of the "Restatement of the Law of Trusts" has been published by the American Law Institute. Section 73 of Tentative Draft No. 1, cited in the brief, has been published in the final draft as Section 77.

That there can be no justification for the decision of the Circuit Court of Appeals, at least on the grounds laid down by that court, is, we submit, perfectly plain. Not only did the Circuit Court of Appeals for the SEVENTH Circuit, after careful consideration of the opinion of the Circuit Court of Appeals for the Second Circuit in the instant case, definitely disagree with that court, (*Commissioner* v. *McIlvaine*

& Wilson, 78 F. (2d) 787, opinion also printed in supplement to brief in support of petition for certiorari) but even respondent has now apparently abandoned that position entirely. In the last brief filed by respondent there is no mention whatsoever of *Snyder* v. *Snyder,* 280 Ill. 467, or *Marble* v. *Marble's Estate,* 304 Ill. 229, and the argument which apparently was persuasive in the Circuit Court of Appeals below has been entirely abandoned. In his brief on the merits, respondent nowhere contends that "the amendments cannot be effective as erecting separate and distinct trusts for lack of definite subjects" (as stated by respondent in his brief in opposition to petition for certiorari) or that "the amendments were ineffective to create separate and independent trusts for each of the beneficiaries for lack of a definite and separate corpus," (as stated by the lower court).

The law is plain that an undivided interest constitutes such property as may legally be conveyed in trust and as may legally constitute the corpus of a separate trust.

Respondent's Present Position.

The present position of respondent seems to be that the amendment of September 21, 1918, was ineffective to convert a single trust estate into three separate trusts, and that although the later amendments are admittedly a factor in construing the first amendment, they do not succeed in dividing the old trust into three new trusts.

Petitioner's Position.

It is petitioner's position that respondent is demonstrably wrong with respect to both phases of his contention. The present argument of respondent, however, does narrow the issues as petitioner has sought to narrow them from the beginning of this litigation. It would seem that it can now

be accepted as a premise that except as the Court might find some ambiguity in the language used in the amendments, it is the intention of the parties, as expressed in those amendments, which must control the decision of this case.

Petitioner contends, first, that even if the amendment of September 21, 1918, is considered alone and independent of the later amendments, it adequately expressed the intention and purpose to create three separate trusts; second, the first amendment should not be construed alone and without regard to later amendments because the later amendments also changed, and in several instances rechanged, the form of the trust agreement, and it is the instrument as so changed and which was in effect during the taxable years with which the Court is concerned; and, third, if the language of the instrument as changed by all of the amendments and as in effect during the taxable years is considered there can be no possible question but that it was the clearly expressed intention of the parties to create separate trusts.

First Amendment Creates Three Trusts.

Respondent argues that the language of the first amendment, considered by itself, is insufficient to divide the old single trust into three new trusts. May we call attention to the language of the amendment as quoted by counsel (pages 11-12 respondent's brief).

First it provides that the trust shall be "divided". Nothing more futile can be imagined than the use of this word unless an actual legal *division* of interests was intended.

It is further provided that the trust shall be divided "into three separate and equal parts or shares." It is thus plain that the division was intended to bring about a legal *separation.*

Next is the provision that undivided interests in the trust fund may be "assigned" to each of the separate shares into which the old trust shall be divided. Unless these shares were legally separate trusts, why provide for an assignment to each of them?

The legal separation of the parts into which the trust is to be divided is further shown by the provision that such parts "shall severally be designated" by the respective names of the particular beneficiaries for whom each of said parts is to be held.

The second paragraph of the amendment provided in part as follows (R. 50):

> "*Second.* The whole of the net income received from each share during the remainder of the year 1918, and one-half of such net income received after December 31st, 1918, and during the life of the said John P. Wilson, the creator of said trust, shall be accumulated and added to the principal of such share; provided, however, that each of the undersigned [beneficiaries] upon his or her written request, approved in each case by said John P. Wilson and delivered to the said Trustee, shall be entitled to receive the whole or any part of the one-half of the said net income of his or her share of said trust estate * * *."

It is thus plain that the parties contemplated in clearly expressed language that different amounts of income might be paid out of the different shares, and the shares might thus by reason of differing accumulations become unequal in value and different in character of investments held.

Furthermore, the first paragraph of the amendment, which gave to the Trustee the right to assign undivided interests to each share, did not require the Trustee to do so. It was entirely within the realm of possibility that the Trustee might have made different investments on behalf of each share, and had the accumulations been different by

reason of any action taken under the second paragraph, it is obvious that the Trustee would have been compelled to have invested varying amounts in the several shares. Apparently it is the position of respondent that the Trustee was authorized by the trust instrument only to make investments in undivided interests (p. 13, respondent's brief). The language actually used, after providing for the division of the trust estate into three separate and equal shares, is as follows:

> "* * * to which may be assigned undivided interests in the whole or any part of the said trust estate."

This language, we submit, can only mean that the Trustee was given the privilege of investing in undivided interests, but that it is not required to do so.

Counsel places great emphasis on the fact that the words "parts" or "shares" were used in the first amendment in connection with references to the old trust estate. He says, page 13 of his brief, that a more usual phrasing would have been to declare that the "three estates" were each to be held in trust for one of the beneficiaries. In fact respondent's main argument now seems to be that in the first amendment the words "which parts or shares" were used instead of "which trust estates." That would be a narrow ground on which to base a decision in this case, particularly where all succeeding amendments repeatedly used the very words suggested by counsel!

We submit that any unprejudiced reading of the first amendment alone can lead only to the conviction that it was the intention of the parties to legally separate the trust estate into three separate trusts.

ALL AMENDMENTS MUST BE CONSIDERED.

But the first amendment cannot and should not be read alone and isolated from the later amendments, in which amendments phrases such as the "three trusts", or the "three separate trusts", are found many times.

The original instrument, except as changed, and the changes in effect during the taxable years must all be considered together to determine the intention of the parties. One of the amendments can no more be considered by itself without regard to the others than one sentence in one of the amendments can be considered without regard to the sentences adjacent to it. It must be remembered that each one of the amendments merely changed the original instrument as theretofore modified, in the specific respects covered by the particular amendment. It must also be remembered that each amendment was adopted pursuant to the power reserved in the original instrument, and that the sentence in which the power was reserved ended as follows (R. 48):

> "* * * and after the date of any such modification or alteration this indenture as so modified or altered shall be in force and govern the rights and powers of all parties concerned, the same in all respects as though said indenture had originally been executed in such modified or altered form."

The very source of the power to modify the document thus provides that each modification must be read into the instrument as theretofore modified. The first, second, and third amendments became effective in 1918, 1919 and 1920, respectively, and the fourth amendment in 1928. The years involved in this litigation are the years 1924 to 1929, inclusive. There is no justification, therefore, for the position of the government that the first amendment must be considered alone. As a matter of fact, none of the provisions of the amendment relating to the payment of income (the

whole of the second paragraph) were any longer in force during the years under consideration. Those provisions were entirely changed by the second amendment, which in that respect was again changed by the third amendment.

The technical requirement of the original indenture is conclusive in requiring this Court to examine *all* the instruments in order to determine the intention of the parties who drew them.

When Considered Together the Amendments Clearly Express the Intention to Create Three Trusts.

Any doubt as to the meaning of the first amendment would be entirely dissipated by the language in the later amendments. On this point, the Board of Tax Appeals, in its opinion, said, (R. 64-65):

> "In the first amendment provision was made for the division of the trust estate into three separate and equal parts, one for each of the three beneficiaries. Any doubt as to the meaning of this language is cleared up by the modifications made by the agreement executed on June 19, 1919. There the beneficiaries, with the written approval of the grantor, stated that one-half of the net income of 'each of the three trust estates' should be disbursed in a prescribed manner; that any net income from 'each of said trusts' not paid over to the beneficiaries, should be added to the principal of the trust fund from which it was derived; and that upon the termination of the 'trusts' the corpus of the 'several trust estates' held by virtue of the indenture should be distributed as provided for. Language of the same general character was used in amendments made on December 1, 1920, and April 25, 1928."

The repeated use in the last three amendments of the phrases "each of the three trust estates", "each of said trusts", "the several trust estates", "each of said separate trusts", "all of said trusts", "each separate trust estate", "the separate trust estate", and "said trusts",

and the requirements in those amendments with reference to the payment of income and the distribution of the principal from the several trust estates or the separate trust estates, leaves no possible doubt as to what the instrument as changed by all the amendments means.

The words used are consonant only with the intention to create separate trusts. They cannot be distorted into disclosing any other purpose.

We agree with the respondent that the intention of the parties must be determined from the language used in the instruments unless there is some ambiguity in that language. If there were any ambiguity in the first amendment, considered alone, there is certainly none in that amendment when considered in connection with the language appearing in the following amendments. We do not therefore believe that parol evidence of the purpose of the parties to create three separate trusts (R. 83) is of any particular significance. If, however, the meaning of the first amendment should be deemed to be uncertain or ambiguous, evidence of the circumstances giving rise to its adoption, including the purpose of the parties, would be admissible as an aid to its interpretation. (Restatement of the Law of Trusts, Section 38, Comment a.)

Respondent's List of Considerations in Support of His Position.

Respondent, on page 17 of his brief, seeks to list a preponderance of reasons, in the numerical sense, why these amendments should be held to have failed to accomplish the purpose of the parties. Were it useful to do so, we might set forth a large number of considerations supporting petitioner's position. Each of the various provisions in each of the amendments, the repeated acts of the Trustee in treating the trusts as separate, and the aqui-

escence of the parties in such action, might all be set forth as separate reasons, but we believe that nothing is gained by such treatment of the facts. It might, however, be enlightening to examine for a moment the various considerations which the Government sets forth in support of its position.

1. It is alleged that the separate trusts or accounts relate only to undivided interests in a fund which originally constituted the corpus of a single trust. This is the only place in the respondent's brief where apparently respondent goes back to the old position originally taken in this case, namely, that undivided interests in a single fund are too indefinite to form the corpus of a separate trust. If, however, it is legally proper to create a separate trust of which the corpus is an undivided interest, a proposition which the authorities clearly establish and which apparently the Government no longer denies, then obviously the fact that the corpus of these separate trusts were undivided interests in an aggregate fund gives no support to the Government's contention.

2. Respondent says the trusts were created by a single instrument. The Government makes this statement apparently in the belief that separate trusts cannot be created by a single instrument, or at least that the use of a single instrument in carrying out the intention of the parties has some bearing on the question. We confess that we cannot follow this argument. This Court can take judicial notice of the fact that perhaps the most usual way of creating separate trusts is by will. Certainly there can be no question, and there has never been any question in this case, but that it was perfectly proper to create separate trusts by a single instrument. The Circuit Court of Appeals for the Seventh Circuit, in *Commissioner* v. *McIlvaine and Wilson,* 78 F. (2d) 787 (also printed in the

supplemental brief in support of the petition for writ of certiorari in this case, page 8) said:

> "It is well settled that separate and several trusts may be created by the same instrument, and be administered by the same trustees. *DeVer H. Warner, Trustee,* v. *Commissioner,* 7 B. T. A. 1292 (affirmed 26 F. (2d) 1023); *Lynchburg Trust & Savings Bank* v. *Commissioner,* 68 F. (2d) 356; *Carruth* v. *Carruth,* 148 Mass. 431; *Claflin* v. *Dewey,* 177 Mass. 166."

3. Respondent states they were to be administered by a single Trustee. What possible bearing can this have on the question? Surely the United States Trust Company of New York can be Trustee of a very large number of trusts. Nor is there any difference in substance, so far as income taxes are concerned, whether the United States Trust Company remained Trustee of each of these three trusts or separate trust companies were chosen for each trust.

4. Respondent argues that the first amendment used language more consonant with establishing separate accounts within the original trust estate than with its termination and the creation of new trusts. We believe we have shown that the language used in the first amendment, even if considered alone, but particularly when considered in conjunction with the language used in the later amendments, is only consonant with the establishment of separate trusts. If separate trusts were not created much of the language used must be entirely ignored.

5. The Government states that the Trustee "and the beneficiaries" construed the amendment [sic] as though it effected no legal division into separate trusts, because "the petitioner" continued to act as though it were a single trustee for a single trust. This statement is not justified by the facts in the record, and is clearly baseless on two separate grounds. First of all, we ask, how the action of the Trustee, whatever it may have been, can

constitute a construction of the instrument on the part of the beneficiaries? It must be remembered that it was the beneficiaries and the settlor of the trusts whose intention controlled. The Trustee had no power to amend the instrument. The amendment had to be by the beneficiaries and the settlor. What the Trustee did could not be binding upon them except in so far as they acquiesced in actions believed by them to have been based on the assumption that there was only one trust. We have already shown (p. 5, *supra*), in some detail that the various acts of the Trustee, as disclosed by the record, clearly indicated that the Trustee did not act as the trustee for a single trust, but as the trustee of three different trusts, and it was so considered by the beneficiaries. Not only was the language used by them in the various amendments clear on that point, not only did they regularly receive reports from the trustee as trustee of three separate trusts, but the letter written by John P. Wilson, Jr., on December 28, 1922, after the first three amendments were in effect unequivocally shows what his interpretation of the amendments was. This letter was originally marked for identification by the Government as Respondent's Exhibit A. (R. 85.) The Government, however, apparently decided not to introduce it, and it was therefore put in evidence by petitioner as its Exhibit 56. (R. 102.) The letter (R. 183), was addressed to the Trustee and read in part as follows, after quoting from the Amendment of December 13, 1920:

> "In accordance with the clause which I have just quoted, I would appreciate your having proper entries made on your books, as of December 31, 1922, and on the thirty-first of December in each year thereafter, showing that all of the net income on hand on each December 31st, was transferred to the principal of the separate trusts from which the income was derived. I should like to have the statements rendered to me show that this has been done so that the provisions of the trust as amended may be strictly carried out."

6. The Government states that the beneficiaries exercised mutual control over the income distributions from each account. Respondent may believe that this is an unusual provision, but certainly we can find nothing in the provision which has any bearing on the question at issue. It is just as unusual to give one beneficiary control over the amount of income which another may withdraw from a single trust as it would be to give the beneficiaries of the separate trusts control over the income distributed from the other separate trusts. Furthermore no beneficiary had any power with respect to income distributions to any other beneficiary until the *second* amendment. If item six in the government's list is to be given any weight therefore it can only be on the assumption that all the amendments are to be taken into account in determining the intention of the parties. The government cannot on the one hand argue that the first amendment alone is the one which must be interpreted, without any consideration being given to the language in the later amendments, and at the same time argue that one of the provisions in the second amendment is inconsistent with the intention to create three trusts. We do not believe that the item has the effect which the government claims, but we do insist that all of the amendments must be considered for all purposes.

7. Finally, the Government states, as the last consideration in support of its position, that the amendments provided that the distribution of income from and interests in the corpus should always be equal. Here again the Government refers not to the first amendment nor to the second, because such provision appears for the first time in the third amendment. But in any event what light does the desire of the settlor and of the beneficiaries to maintain these separate trusts on an equal footing as between the settlor's children throw on the question involved?

There are occasions when a number of factors added

together may take on a significance which no one of them considered alone possesses. This general rule, however, has no practical application to the present situation. Even if the items listed by the Government on page 17 were based upon undisputed facts none of them, except items 4 and 5, whether considered singly or as a group, would have any weight in this case.

If it were true, as stated in item 4, that the language of the first amendment was more consonant with the establishment of separate accounts within a single trust than with the creation of three new trusts, that fact would have to be considered in resolving the question before the Court, provided no help could be derived from the later amendments. We submit, however, that the language of the first amendment is meaningless unless it expresses the intention to create separate trusts, and even if there were some doubt about the meaning of that language it must be considered in the light of the provisions of the later amendments. When so considered, no question can possibly remain as to the real intention of the parties.

If it were true, as stated by the Government in item 5, that the Trustee and the beneficiaries construed the first amendment as constituting a single trust, that might have some bearing on the interpretation of the language used, assuming that it was ambiguous. We submit, however, that not only is the language clear, particularly when taken in connection with the second, third and fourth amendments, but the record does not bear out the contention that the Trustee and the beneficiaries construed the amendment as constituting a single trust.

The question to be answered in this case is, what was the intention of the parties as disclosed by the language used in the instruments? We seriously doubt whether the attempt of the Government to list various considerations

which it believes to have bearing on the question is helpful. Particularly, we doubt whether the fact that, as listed by the Government, there are numerically more considerations believed by the Government to support the position of respondent than there are considerations believed by the Government to support the position of the petitioner is of any significance here. There are a large number of considerations which in the absence of a clear expression of the intention of the parties might have some weight. Where, however, the parties have clearly expressed their intention, as they have done in this case, there would seem to be no occasion for seeking to determine that intention by the recitation of such facts, as, for example, that the several trusts were created by a single instrument.

Economic Interests of Beneficiaries Materially Changed by Amendments.

Respondent argues that the conclusion which it seeks to draw from its list of considerations finds support from the fact that from the economic viewpoint the interests of the beneficiaries was the same after as before the amendment of the original indenture. In the first place, this proposition is not factually correct. The original trust instrument provided for the payment of one-third of the income to each of the three children of the settlor. The first amendment provided for the payment of one-half the net income from each of the separate trusts to the beneficiary for whom that trust was held, with the proviso that with the consent of the settlor either of the beneficiaries might draw down the other half of the income. If the other half of the income was not paid out under the proviso it was to be accumulated and added to the principal of the divided share set aside and held for that beneficiary.

In the second amendment there were changes not merely with respect to the enjoyment of income, but with respect to the distribution of principal. It was there specifically stated that one-half of the net income of each of the three trust estates should be paid over to the beneficiaries entitled thereto, and the other half was only to be paid over when requested by an instrument signed by two of the named beneficiaries. This is the first time that the several beneficiaries were given any mutual control over any part of the income to be paid to the other beneficiaries. But the language in this amendment is so definite that there can be no question but that the parties were dealing with separate trusts. In the original trust instrument each beneficiary had a general power of appointment with respect to the payment of one-third of the income from the whole trust estate. By the second amendment, however, this power of appointment was limited to the issue of the settlor, the surviving wife or husband of the deceased beneficiary, or to charity.

With respect to the distribution of principal the original trust agreement gave to each of the beneficiaries a general power of appointment over one-third of the principal of the trust estate. By the second amendment this general power of appointment was limited so that it could only be exercised in favor of the issue of the settlor, the surviving wife or husband of the deceased beneficiary, or for charitable purposes.

It is significant also that the tax in this case is on *accumulated* income, which by the terms of the documents became a part of the principal. As we have just shown, the economic interest of the beneficiary in this accumulated income, frozen into capital, was far different after the amendments than before.

The third amendment again materially changed the rights

of the beneficiaries with respect to the enjoyment of income. Instead of the outright payment of one-half of the income from each of the separate trust estates, as provided by the second amendment, it was provided that only so much of the net income from each of the separate trust estates should be paid out as was requested or directed by one or more instruments in writing signed by a majority in interest of the beneficiaries then entitled to share or participate in any distribution made of the income of all of said trusts.

We submit, therefore, that it is incorrect to state that the beneficiaries had an interest in the subject matter of these trusts which was from an economic point of view precisely the same after as before the amendments to the original indenture. The fact is that the amendments materially changed the rights of the beneficiaries with respect to the enjoyment of income, and materially changed the powers of each beneficiary with respect to the appointment of income and of principal after the death of each beneficiary.

Even if the statement made by respondent that there was no perceptible change in the economic interests of the beneficiaries were true, that fact can have no bearing in this particular case. It is not arguable that if the original instrument had been drawn in the form which that instrument took on after the adoption of the several amendments, separate trusts would have been created. Assume that the settlor of a trust owned an office building in the city of Chicago. Assume further that he conveyed an undivided one-third interest in this office building to each of three separate trustees for the benefit of each of his three children, respectively. The economic interest of each beneficiary in this situation is quite similar to what it would be if the whole property were conveyed in a single trust to one trustee for the equal benefit of the three children. If

the instruments in the assumed case provided for the distribution of all of the income currently to the beneficiaries of each of the separate trusts, or provided for the distribution of one-third of the total income to each beneficiary in the event of a single trust, it is clear that the amounts received by each beneficiary would be substantially the same. That, however, would not make the separate trusts into a single trust any more than it does in the instant case. Here we are dealing with an act of Congress which taxes the accumulations of separate trusts separately. If there is any fundamental logic or ethics in the situation it would lead to the conclusion that accumulations primarily for the benefit of one of these children ought not to be added to the accumulations primarily for the benefit of the other two children for the purpose of determining the tax rate on those accumulations.

Authorities Cited by Respondent.

Respondent in his brief apparently admits by implication that literally construed the documents would create separate trusts and the Federal statutes would so tax them. He says, on page 19, "Unless a barren literalism is to be the guide * * *" the income should be taxed as the income of a single trust. Possibly Congress has the constitutional power to tax these separate trusts as though they were a single trust. The point is, however, that Congress has not done so. If there were any doubt as to the intent of the statute on this point that doubt would have to be resolved in favor of the taxpayer in accordance with the principle stated many times by this Court, and again laid down no longer ago than November 11th, 1935, in *McFeeley* v. *Commissioner* (..... U. S. .....; 80 L. Ed. 44; 56 S. Ct. 54) and the other cases argued with that case.

Respondent cites several cases on page 18 of his brief

in connection with the argument that there was no perceptible change in the economic interests of the beneficiaries brought about by the amendments and that therefore the legal change in the situation should be ignored. In *Corliss* v. *Bowers*, 281 U. S. 376, *Tyler* v. *United States*, 281 U. S. 497, and *Burnet* v. *Wells*, 289 U. S. 670, the Court in each case was passing upon the constitutionality of a provision in a Revenue Act. Those decisions might have been in point had Congress passed a law amalgamating these separate trusts into one trust for purposes of taxation. They can have no bearing on the question, however, so long as Congress has not passed such a law but continues to tax separate trusts separately. In *Burnet* v. *Guggenheim*, 288 U. S. 280, the question was whether the cancellation of a power of revocation in a trust agreement constituted a gift under the provisions of the Gift Tax law. The Court decided that the reservation of the power of revocation in the original trust instrument made the gift inchoate and imperfect until the cancellation of the power of revocation. In reaching the conclusion that the gift actually came into effect when the power was canceled, the Court was influenced by a consideration of the actual economic benefits on which the tax was paid. We submit that the facts there before the Court and the provisions of the statute were so different in actuality and in principle from those in the instant case that the decision can have no bearing here.

The Government argues that if the original trust be divided into three separate trusts, one for each of the children of the settlor, there is no reason why it might not be further subdivided and resubdivided into such a number of trusts that the accumulation in any one of them would be so small as to require no tax at all. It is not necessary for us to speculate on the nature of the decision which would be rendered in such a case. There is no such situation be-

fore this Court. We suggest, however, that the case assumed by the Government is primarily one for the consideration of Congress.

The Government apparently believes that its argument on this point is strengthened by the fact that the original settlor in this case created another trust for the same beneficiaries, the tax situation with respect to which is now before this Court in No. 566. Although the Government has contended that each of the two trusts originally created by the settlor still constitute a single trust in spite of the amendments thereto, the Government has never contended that these trusts should be amalgamated into one. In the stipulation filed in the Board of Tax Appeals with respect to both cases it is specifically provided that the question in each case is whether there is one trust or three and all other issues are waived. The Government, therefore, at least admits that the two trusts originally created by the settlor for these three beneficiaries are separate and distinct.

The most that can be said for the Government's argument is that it might be persuasive with Congress. The argument cannot be effective beyond that point. We assume that the Government does not deny that three trusts could have been created here. Suppose three trusts exactly like the three trusts which petitioner now contends did exist had originally been set up, one for each child of the settlor, with provisions in each case for modification and creation of a greater number of trusts through such modification. Could the existence of that power of modification be cited as a reason for denying that three trusts existed to start with? When the modifications of the original trust instrument were adopted in this case the parties had the power to terminate the old trust and to set up three entirely new trusts had they desired to do so. They chose, however, to bring about the same result through modifications of the original

instrument. The fact that the power to amend and modify or to terminate the three new trusts still exists can have no bearing on the legal question here involved, which is, are there three trusts, or is there only one trust?

In the instant case the settlor created a single trust for his three children. The amendments divided this single trust into three separate trusts, one for each child. Is there any reason, logical, ethical or legal why this could not be done? Certainly no reason can be found in the statutes enacted by Congress.

We agree with the Government that most of the decisions of the lower Federal Courts are not particularly helpful in the determination of this case. As stated by the Board of Tax Appeals in its decision in favor of the taxprayer in the companion case of *McIlvaine & Wilson* v. *Commissioner*, 29 B. T. A. 304, at 311:

> "* * * In the final analysis cases of this sort must stand or fall on the basis of their own peculiar facts. It has been said that 'no will has a twin brother.' * * * The same is equally true as regards instruments executed with respect to the creation of trusts."

The Government has cited and discussed a number of cases on pages 20 and 21 of its brief. Because we are in agreement that each of these cases must be judged on its own peculiar facts, we do not believe a detailed discussion of them would be particularly enlightening. We desire to call the Court's attention, however, to several points in connection with these citations. The first case cited is *State Savings Loan & Trust Co.* v. *Commissioner*, 63 F. (2d) 482 (C. C. A. 7th). In that case Judge Evans in the opinion of the Court said, page 483:

> "* * * The issues arise out of and are determined by a consideration of the trust agreement."

In that trust agreement there was nothing which purported to set up separate trusts and the Court found that only one trust was created. *This same court*, however, when

the case of *Commissioner* v. *McIlvaine & Wilson,* (78 F. (2d) 787) came before it, a case which is admittedly identical in all substantial respects with the instant case, decided that the instrument clearly created three separate trusts.

The Government also cites several decisions of the Board of Tax Appeals. Among these is *Rauers* v. *Commissioner,* 28 B. T. A. 516. It is not necessary for us to question the soundness of that decision as there was nothing in the will being interpreted in the *Rauers* case which purported to separate the single fund into separate and distinct trusts. It is worth noting, however, that the Board cited in the *Rauers* case, in support of its decision, an earlier decision of the Board, *Lynchburg Trust & Savings Bank* v. *Commissioner,* 27 B. T. A. 1182. The latter decision was reversed by the Circuit Court of Appeals for the Fourth Circuit in *Lynchburg Trust & Savings Bank* v. *Commissioner,* 68 F. (2d) 356 (C. C. A. 4th). We admit that the facts in the *Lynchburg* case are distinguishable from those at bar, but we submit that a reading of the instrument before the Court in the *Lynchburg* case can only lead to the conclusion that the language used, which the Court held created separate trusts, was far less positive in that respect than the language of the amendments now before this Court.

The Government also cites *Sparrow* v. *Commissioner,* 18 B. T. A. 1, and *Campbell* v. *Commissioner,* 15 B. T. A. 414. In neither of these cases was there any provision in the documents before the Board expressing any intention to create separate trusts. The only argument made in the *Sparrow* case in support of the contention that there were separate trusts was that a decision of the Supreme Court of the County of New York necessarily involved a conclusion that there were three trusts although the testator

had not so provided. The Board in deciding that there was a single trust, said page 11:

> "• • • There is no statement in the interlocutory decree or the final judgment of the Court that the proper construction of the will of Edward W. Sparrow is that three trusts were created. • • •"

Whatever persuasive force these decisions of the Board of Tax Appeals might have had in this case (and we submit that on the facts they have no such force) would be wholly nullified by the fact that the Board of Tax Appeals in the instant case found as a fact and decided that three trusts had been created, and likewise found as a fact and decided that three trusts had been created in the companion case of *McIlvaine & Wilson* v. *Commissioner*, 29 B. T. A. 304.

Other Authorities.

The Government states that petitioner relies on one case, *Lynchburg Trust & Savings Bank* v. *Commissioner*, 68 F. (2d) 356 (C. C. A. 4th), (Certiorari denied 292 U. S. 640). The Government apparently ignores the cases cited in the petition for certiorari and in the brief in support thereof, which we ask the Court to consider on behalf of petitioner in this case. It is true that the occasion for deciding the question as to whether a trust instrument creates one or more trusts does not often arise. It does arise in connection with Federal income taxes, and it arises in the State of New York in connection with the rule prevailing in that state as to the length of time a trust may continue in existence. We submit that the language used in the several New York cases cited by petitioner, which was held in those cases to create separate trusts where property was held by a single trustee and the main fund was kept *in solido*, undivided shares being set apart for each of the separate trusts, was much less positive than the language

used in the instant case. See: *In re Colgrove's Estate*, 221 N. Y. 455, at 459 (117 N. E. 813, 814); *Stevenson* v. *Lesley*, 70 N. Y. 512, 516; *Vanderpoel* v. *Loew*, 112 N. Y. 167, 177, 179, 180 (19 N. E. 481, 482, 483, 484).

We submit that insofar as the authorities can be helpful at all in determining the question whether the language used in the instruments now before this Court creates separate trusts, those authorities clearly indicate that separate trusts were created here. In none of the cases cited by the Government was the language as specific with respect to the creation of separate trusts as it is here. We have no quarrel with the decision in those cases. On the other hand, we have cited a number of cases where the Courts have decreed that separate trusts were created, by language less definite than in the instant case, although perhaps more specific than in the cases relied upon by the Government. Of more weight, however, are the decisions of the Board of Tax Appeals in *McIlvaine & Wilson* v. *Commissioner*, 29 B. T. A. 304, and in the instant case, these cases being substantially identical, and the decision of the Circuit Court of Appeals for the Seventh Circuit in *Commissioner* v. *McIlvaine & Wilson*, 78 F. (2d) 787, rendered after a careful consideration of the decision of the Second Circuit in the instant case.

Conclusion.

We respectfully ask this Court to reverse the decision of the Circuit Court of Appeals for the Second Circuit, not only because the reasons given by that Court for its opinion are contrary to well established principles of law, but primarily because the language used in the instruments now before this Court clearly expresses the intention of the parties that separate trusts were to be created, and because nothing which was done has prevented that clearly

expressed intention from being realized. If separate trusts are under certain circumstances to be amalgamated and treated as one for purposes of taxation, it should be done by act of Congress and not by the Courts. The Internal Revenue laws governing these cases provide for the taxation of separate trusts separately. These are separate trusts and they must be so taxed.

Respectfully submitted,

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